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In the Supreme Court of the United States

OCTOBER TERM, 1980

DIVERSIFIED RESOURCES CORPORATION,
Petitioner,

v.

JOHN BUXTON, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the transmittal to a corporation's creditor of an "audit confirmation letter", prepared by an independent accounting firm for the purpose of verifying accounts payable as a component of the preparation of an annual financial statement, constitutes an acknowledgment of a corporate debt sufficient to toll the applicable Statute of Limitations, or estop the assertion of that defense, absent any evidence that the corporate officers were authorized or intended to acknowledge such debt?

PARTIES

The parties to the proceedings before the United States Court of Appeals for the Tenth Circuit appear in the caption. In the proceedings before the United States District Court for the District of Utah, Central Division, Millard Nelson, appeared as a party-plaintiff in addition to John Buxton. The claims of Millard Nelson were not at issue in the proceedings before the Court of Appeals for the Tenth Circuit and are not at issue in this proceeding. Petitioner, Diversified Resources Corporation, has no subsidiary nor parent corporations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Supreme Court Rule 19, Petitioner prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Tenth Circuit which affirmed a decision of the United States District Court for the District of Utah, Central Division, granting Respondents' Motion for Summary Judgment.

OPINIONS BELOW

The Order of the United States District Court for the District of Utah granting the Motion of Plaintiff-Respondent John Buxton for Summary Judgment is un-

reported and is set forth at page A-14 of the Appendix to this Petition.

The Opinion of the Court of Appeals in *Buxton v. Diversified Resources Corporation* is reported at 634 F.2d 1313, and is reprinted at page A-1, *et seq,* of the Appendix to this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit was entered on November 25, 1980. An Application for Extension of Time Within Which to File Petition for Writ of Certiorari was filed on February 20, 1981, and was granted by Mr. Justice Byron White on February 20, 1981. The time within which to file this Petition was extended to, and including, April 13, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

1. Whether the transmittal to a corporation's creditor of an "audit confirmation letter", prepared by an independent accounting firm for the purpose of verifying accounts payable as a component of the preparation of an annual financial statement, constitutes an acknowledgment of a corporate debt sufficient to toll the applicable Statute of Limitations, or estop the assertion of that defense, absent any evidence that the corporate officers were authorized or intended to acknowledge such debt?

STATUTORY PROVISIONS

Section 12-44 of the Utah Judicial Code, § 78-12-44,

Utah Code Ann. (Repl. Vol. 9A 1977), p. 244, provides as follows:

> 78-12-44. PAYMENT-ACKNOWLEDGMENT-PROMISE TO PAY EXTENDS PERIOD. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

STATEMENT OF THE CASE

Petitioner seeks review of a decision of a panel of the United States Court of Appeals for the Tenth Circuit which affirmed an Order of the United States District Court for the District of Utah granting the Motion of Plaintiff-Respondent John Buxton for Summary Judgment.

Those decisions, absent review by this Court, will have a potentially catastrophic effect upon contemporary accounting procedures and upon the reported debt structure of all corporations whose stock is publicly traded.

At issue is whether audit confirmation letters, prepared by independent accountants and sent to randomly selected creditors of a corporation, have a binding legal effect sufficient to waive an existing valid defense to the claims of such creditors. Both the District Court and the

Court of Appeals have held that confirmation letters may so bind a corporation.

Diversified Resources Corporation, (hereinafter "Diversified Resources"), a Nevada corporation and successor in interest to U. S. Silver and Mining Corporation, U. S. Copper Corporation, and Mojave Uranium Corporation, was sued by John Buxton, (hereinafter, "Buxton"), to recover on an allegedly lost or destroyed promissory note and by his co-plaintiff, Millard Nelson, to recover on an open account for various goods and services. Jurisdiction of the District Court was based upon diversity of citizenship and was founded upon 28 U.S.C. § 1332.

Buxton claims he loaned the sum of $20,000.00 to Diversified's predecessor, U. S. Silver and Mining Corporation, during the month of October 1969 and that approximately one year later a promissory note was prepared to secure repayment of the debt. However, he is unable to produce either the original or any copy of the alleged promissory note.

Under these circumstances, the four year Statute of Limitations, found at Section 12-25(1) of the Utah Judicial Code, § 78-12-25(1), Utah Code Ann. (Repl. Vol. 9A 1977), is applicable.

This defense was timely raised in Diversified's Answer. As Buxton's Complaint was not filed until February 15, 1976, the pleadings establish, *prima facie,* the bar of the Statute of Limitations.

Beginning in 1971, a series of audit confirmation letters were sent to Buxton. Copies of those letters are reproduced at page A-18, *et seq,* of the Appendix to this

Petition. Those confirmation letters, which make reference to a debt in the amount of $20,000.00, were prepared by an independent accounting firm during the course of annual independent audits of Diversified's financial records. The letters were mailed by, or under the direction of, the accounting firm, but were routinely signed by Diversified's officers. The individual accounts which were the subject of the audit letters were randomly selected by the independent accounting firm.

It was not the intent of the signators of those audit confirmation letters to waive the defense of the Statute of Limitations or acknowledge the purported debt. There is no evidence on the record which suggests that Diversified's Controller or its President, the signators of the letters, were authorized to waive this defense.

After the close of discovery, Buxton filed his Motion for Partial Summary Judgment. A hearing on that Motion was held before the Honorable Willis Ritter, now deceased, on March 10, 1977. Subsequent to the hearing the Court entered its Order Granting Partial Summary Judgment and Judgment. Shortly thereafter Diversified filed a Notice of Appeal to the Court of Appeals for the Tenth Circuit.

The Court of Appeals denied the appeal for the reason that the Partial Summary Judgment was not appealable.

After remand, Buxton filed a Motion for Determination and Direction Pursuant to Rule 54(b), Federal Rules of Civil Procedure. That Motion was granted and

the District Court entered its Order Granting Partial Summary Judgment and Findings, Determination, Certification and Direction pursuant to Rule 54(b), Federal Rules of Civil Procedure.

Diversified then moved to amend the District Court's Order. The District Court entered its Amended Order Granting Partial Summary Judgment and Findings, Determination, Certification and Direction Pursuant to Rule 54(b), Federal Rules of Civil Procedure. That final Order is reprinted at page A-14, *et seq,* of the Appendix.

An essential component of that Order is found at paragraph 7 of its Findings of Fact and Conclusions of Law. The Court expressly held that the transmittal of audit confirmation letters stayed or tolled the applicable Utah Statute of Limitations and that Diversified was estopped from asserting the Statute of Limitations as a bar to Buxton's claim.

Shortly after entry of that Order, Diversified filed its Notice of Appeal to the Court of Appeals for the Tenth Circuit.

On November 25, 1980, the Court of Appeals entered its decision affirming the decision of the District Court. The Court specifically held that the transmittal of audit confirmation letters which make reference to a corporate debt and are signed by an officer of the corporation constitutes an acknowledgment within the meaning of Section 12-44 of the Utah Judicial Code, § 78-12-44, Utah Code Ann. (Repl. Vol. 9A 1977), sufficient to toll the Utah Statute of Limitations.

REASONS FOR GRANTING WRIT OF CERTIORARI

POINT I.

THE COURT OF APPEALS HAS DISREGARDED THE PRIMACY OF STATE LAW AS TO A STATE CREATED RIGHT IN THE CONTEXT OF A CASE ARISING UNDER DIVERSITY JURISDICTION.

A federal court must follow State law in deciding whether a nonfederal claim is barred by a State Statute of Limitations.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), this Court held that, in a case arising under diversity jurisdiction, State law as to the effect of a Statute of Limitations must be respected by the federal court. This Court stated:

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State created right vitally and not merely formally or negligibly. As to consequences that so intimately effect recovery or nonrecovery a federal court in a diversity case should follow State law. . . . [I]f a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery. (326 U.S. at 110)

In the present case, both the District Court for the District of Utah and the Court of Appeals for the Tenth Circuit have disregarded this fundamental tenet of our

system of federalism. Their decisions have not only served to deprive Diversified Resources of a valid State defense; the precedential effect of those decisions will aid in the abrogation of this State defense as to all similarly situated corporate defendants.

The Court of Appeals and the District Court have substantially ignored Utah law on the bar of the Statute of Limitations and acknowledgments in two crucial particulars. Utah courts have consistently held that: (a) an acknowledgment must be intentional, and (b) a corporate acknowledgment must be authorized.

A.

UTAH LAW REQUIRES THAT AN ACKNOWLEDGMENT SUFFICIENT TO TOLL THE STATUTE OF LIMITATIONS MUST BE INTENTIONAL. THE COURT OF APPEALS HAS EXPRESSLY DISREGARDED THIS REQUIREMENT.

The Utah Supreme Court has consistently held that an acknowledgment, sufficient to toll the Statute of Limitations, must be intentional.

In *Salt Lake Transfer Co. v. Shurtliff*, 83 Utah 488, 30 P.2d 733 (1934), the Utah Supreme Court held that in order to show that a written communication constitutes an acknowledgment sufficient to toll the Statute of Limitations, it must be established that the acknowledgment was intentional. Although the facts in *Shurtliff, supra,* are dissimilar to those in the present case, the law is directly applicable.

In reaching its decision, the Court adopted a line of decisions rendered by the Kansas Supreme Court. The Utah Court stated:

> The later Kansas cases follow the rule that nothing short of a distinct, direct, unqualified, and *intentional* admission of a present, subsisting debt on which a party is liable will be sufficient to take the obligation out of the statute and start it running anew. (83 Utah at 495, 30 P.2d at 736) (emphasis added)

In *Shurtliff, supra,* the Utah Supreme Court also quoted with approval from the decision of this Court in *City of Fort Scott v. Hickman,* 112 U.S. 150 (1884), as follows:

> . . . to deprive a debtor of the benefit of such a statute [. . . of limitations . . .] by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular client and it *must be shown to have been intentional.* (83 Utah at 847, 30 P.2d at 737) (emphasis added)

Although the requirement of intent was not expressly discussed, it was recognized by the Utah Court in an earlier case. In *Weir v. Bauer,* 75 Utah 498, 297 P. 936 (1930), the Court's decision rested primarily on the fact that the documents involved were not intended to be communicated to creditors, however, the Court noted, "[s]uch reports were not made to be communicated to the plaintiff or other creditor, or with the intent or purpose of interrupting the bar of the statute, or as relating to any such subject, but with a wholly different intent and purpose . . ." (75 Utah at 522, 286 P. at 945).

However, in *O'Donnel v. Parker*, 48 Utah 578, 160 P. 1192 (1916), the Court found the absence of an intent to waive the defense of the Statute of Limitations to be dispositive. Although the facts in *O'Donnell, supra,* are again dissimilar to those presently before this Court, the rationale of the Utah Court's decision is directly applicable. In *O'Donnell, supra,* the Court considered whether the listing of creditors in a Petition for Bankruptcy constituted an acknowledgment which would toll the Statute of Limitations. In reaching its decision, the Utah Court noted that an acknowledgment, in a sense, constitutes a waiver of a known right, that is, the defense available by virtue of the Statute of Limitations. Proceeding with this analogy, the Court defined a waiver as the "intentional abandonment of a known right". (48 Utah at 584, 160 P. at 1194). Applying this analogy to an acknowledgment, the Court held:

> . . . [W]here the time has fully run the right to invoke the statute [. . . of limitations . . .] constitutes a vested right, . . . the Courts are slow to declare the same waived, unless the language or conduct of the party possessing the right shows that he *intended* to waive it, or that his language and conduct are such that it can be clearly inferred. (48 Utah at 584, 160 P. at 1194) (emphasis added)

As noted by the Utah Court in *Koch v. J. C. Penney Co. Inc.*, 534 P.2d 903 (Utah 1975), intent or knowledge is also a prerequisite to a finding of estoppel.

Without question, under Utah law a prerequisite to a finding that a communication will toll the Statute of Limitations or estop its assertion is that the acknowledg-

ment was knowing or intentional. The Court of Appeals, in rendering its decision in this case, has not only disregarded this requirement, but has expressly noted that intent was absent. The Court of Appeals stated:

> But in the instant case the president was acting routinely in the ordinary course of his business, and not for the purpose of binding the corporation to a contract at all. He was seeking to notify the debtor as to what the books showed and to receive some response from him. No particular special action was taken in regards to this debt. (634 F.2d at 1317)

In reaching its decision the Court of Appeals disregarded the Utah requirement that an acknowledgment be intentional and specifically found that the purported acknowledgment was not intentional. The Court of Appeals has disregarded Utah law in violation of the principles enunciated in *Guaranty Trust, supra.* Issuance of a Writ of Certiorari to the Court of Appeals for the Tenth Circuit is appropriate.

B.

UTAH LAW REQUIRES THAT AN ACKNOWLEDGMENT BY A CORPORATION MUST BE SPECIFICALLY AUTHORIZED. THE COURT OF APPEALS HAS DISREGARDED THIS REQUIREMENT.

Under Utah law one seeking to establish that a corporate communication constitutes an acknowledgment sufficient to toll the Statute of Limitations must establish that the acknowledgment or waiver was authorized.

In *Salt Lake Valley Loan & Trust Co. v. St. Joseph Land Co.*, 73 Utah 256, 273 P. 507 (1928), the Utah Court recognized this principle and found it to be controlling. A corporate officer had prepared and mailed a letter, which contained a promise to pay a stale debt, to a creditor of the corporation. In deciding whether that letter constituted an acknowledgment sufficient to toll the Statute of Limitations, the Court looked to the authority of that officer to waive a corporate defense. The Court quoted with approval from 1 *Mecham on Agency* (2d ed.), § 990, p. 713, as follows:

> It is not within the ordinary interpretation of authority to manage that the agent shall have any general authority to waive, surrender, or qualify his principal's rights, privileges, immunities or protective conditions. . . . an agent authorized through management to acquire benefits for his principle, can thereby have no corresponding authority to give them up when once acquired. (73 Utah at 265, 273 P. at 511)

The Utah Court held that without specific authorization, a corporate officer lacks the authority to waive a valid defense to a claim against the corporation. The Court found that the corporate officer, although authorized to engage in transactions in the normal course of business, did not possess express authority to waive the defense of the Statute of Limitations. On this basis the Court held that the communication in question was not an acknowledgment and did not serve to toll the Statute of Limitations.

In *Buxton, supra*, the Court of Appeals merely noted that Wallace, the President of Diversified, had ". . . the

authority to act in furtherance of the ordinary course of his business as President of Diversified" and that the audit letters were signed in the ordinary course of business. (634 F. 2d at 1316 and 17). In *St. Joseph, supra,* the Utah Supreme Court held that waiver of the defense of the Statute of Limitations was *not* within the ordinary course of the business of a corporation.

Although, admittedly, Wallace was authorized to sign audit letters, this authority is not synonomous with, nor does it imply, the specific authority to waive a corporate defense. The Court of Appeals has impliedly held that because the signing of audit confirmation letters is within the ordinary course of business, the abandonment of a corporate defense is similarly within the ordinary course of business. This is in direct conflict with the position taken by the Utah Supreme Court in *St. Joseph, supra.*

As set forth above, the Court of Appeals rendered its decision in *Buxton, supra,* in complete disregard of two of the essential prerequisites to a finding of the existence of an acknowledgment under Utah law. The Utah Court has held that an acknowledgment by a corporation must be authorized by the corporation or be within the authority of the acting agent. The Utah Court has also held that every acknowledgment, if it is to toll the Statute of Limitations, must be intentional.

The Court of Appeals recognized that the acknowledgments in the present action were not intentional, yet it held they were sufficient to toll the Statute of Limitations and estop its assertion. Similarly, the Court of Appeals held that the acknowledgment was authorized

because it was within the ordinary course of business even though the Utah Supreme Court, in *St. Joseph, supra,* held that waiver of a corporate defense was not in the ordinary course of business.

The Court of Appeals has failed to follow State law in deciding the validity of a state created defense. This is clearly contrary to the position of this Court as enunciated in *Guaranty Trust, supra.* Not only does this transgression of one of the basic principles of federalism serve to deprive Diversified Resources of a valid defense, it constitutes a clear movement toward the development of a federal body of common law of Statutes of Limitations and acknowledgments. For these reasons, a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should issue.

POINT II.

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH HAVE APPLIED STATE LAW SIMILAR TO THAT OF UTAH.

The Court of Appeals for the Tenth Circuit, in *Buxton, supra,* did not consider the circumstances surrounding the execution and transmittal of the audit confirmation letters in deciding whether those confirmation letters constituted an acknowledgment.

The United States Court of Appeals for the District

of Columbia has held, when applying substantive law substantially similar to Utah law, that the circumstances accompanying the transmittal of a purported acknowledgment are of paramount importance.

In *Moore v. Snider,* 109 F.2d 840 (D.C. Cir. 1940), cert. den. 309 U.S. 685 (1940), the Court considered a contention that a form response to an audit confirmation letter constituted an acknowledgment sufficient to toll the Statute of Limitations. The purported acknowledgment in *Moore, supra,* was ". . . signed in response to a written request stating that the company's auditors were making a regular examination of its accounts and wished to verify them from an independent source." (109 F.2d at 840). In deciding whether this form business communication constituted an acknowledgment, the Court held ". . . that the acknowledgment must not be accompanied by circumstances which negative any intention or promise to pay." (109 F.2d at 841). The Court quoted with approval from *Bell v. Morrison,* 1 Pet. 351, 26 U.S. 351, as follows:

> If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to a certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think, they ought not to go to a jury as evidence of a new

promise, to revive the cause of action. (109 F.2d 841)

Based upon the proposition that ". . . the circumstances of the acknowledgment must show a clear intention to pay the debt", the Court of Appeals for the District of Columbia held that the transmittal of a form response to an audit confirmation letter did not constitute an acknowledgment sufficient to toll the Statute of Limitations. The Court remanded the dispute for the receipt of evidence concerning the circumstances under which the defendant's purported acknowledgment was prepared and transmitted.

The position of the Court in *Moore, supra,* is in direct conflict with the analysis utilized by the Court of Appeals for the Tenth Circuit in *Buxton, supra.*

The decision of the Court of Appeals in *Buxton, supra,* is also in conflict with the position taken by the Court of Appeals for the Ninth Circuit in *Mann v. Pacific Land and Cattle Co.,* 107 F.2d 862 (9th Cir. 1939). In *Mann, supra,* the Court was asked to decide whether correspondence prepared by a corporate auditor and later, by a trustee in bankruptcy reorganization proceedings, were acknowledgments which would toll the Statute of Limitations. One of those letters stated ". . . that the creditor's balance on the books of the corporation was $1,500.00." (107 F.2d at 864). With regard to this particular letter, drafted by the corporation's auditor, the defendant corporation argued that the statements concerning the balance of the account were not authorized.

Upon examining the record, the Court found sufficient evidence to determine that the auditor was not

authorized to acknowledge the debt. On this basis, the Court held that the letter was not an acknowledgment sufficent to toll the Statute of Limitations. This decision, of course, is based upon California law. However, California, like Utah, requires that an acknowledgment by a corporation be authorized. In *Mann, supra,* there was no question that the auditor was authorized, in the ordinary course of business, to prepare and send correspondence concerning corporate accounts. However, the Court recognized that specific authorization is required to waive a corporate defense. (107 F.2d at 864).

The decision of the Court of Appeals for the Tenth Circuit in *Buxton, supra,* is in direct conflict with the position taken by the Court of Appeals for the Ninth Circuit in *Mann, supra.* In *Buxton, supra,* the Court impliedly held that authorization to sign form audit confirmation letters is synomous with, or may be extended to, the authority to waive a corporate defense. The conflict is evident.

Although in *Ingalls v. Ingalls Iron Works Company,* 258 F.2d 750 (5th Cir. 1958), the Court did not consider the issue present in this case, the rationale employed by the Court in reaching its decision is in direct conflict with the position taken by the Court of Appeals for the Tenth Circuit in *Buxton, supra.* In *Ingalls, supra,* the Court considered whether a form response to an audit confirmation letter would serve to convert an open account to an account stated. In deciding that a form response would not serve this purpose, the Court examined the nature of audit confirmation letters and responses. The Court stated:

> May an open account . . . be closed by the mere admission of the bookkeeping balance of an auditor's report? We think, as a matter of law, that it may not be so closed. To hold otherwise would subject every debtor who is considerate enough to answer an inquiry propounded by an auditor (and we take judicial notice that this practice is common in the commercial world) to an action upon an account stated which would increase the burden of his defense, and in some cases even preclude an otherwise valid defense. (258 F.2d at 753)

The apparent sensitivity to the realities of contemporary accounting procedures exhibited by the Court of Appeals for the Fifth Circuit in *Ingalls, supra,* is absent from the decision of the Court of Appeals for the Tenth Circuit in the present case. Although this conflict is not a conflict in the law, the rationale applied by the Court of Appeals for the Fifth Circuit indicates that a result different from that reached in the present case would be reached should the Court of Appeals for the Fifth Circuit be confronted with the same issue.

More importantly, the decision of the Court of Appeals in *Buxton, supra,* is in conflict with the principles enunciated by this Court in *City of Fort Scott v. Hickman,* 112 U.S. 150 (1884). In *Fort Scott,* this Court considered whether correspondence prepared by the City of Fort Scott constituted an acknowledgment within the meaning of the Kansas statute concerning acknowledgments (Gen. St. Kan. c. 80 art. 3 § 18, subd. 1, p. 633). The Utah statute relating to acknowledgments, Section 12-44 of the Utah Judicial Code, § 78-12-44, Utah Code Ann., (Repl. Vol. 9A 1977), was derived from the

Kansas statute and, as noted in *Salt Lake Transfer Company, supra,* Kansas law has been adopted for the purpose of construing Utah's statute on acknowledgments. (80 P.2d at 736). The principles adopted in *Fort Scott, supra,* are therefore applicable to the statute under consideration in the present case.

The decision of the Court of Appeals for the Tenth Circuit in *Buxton, supra,* contradicts the principles enunciated in *Fort Scott, supra,* in two important particulars. First, in *Fort Scott, supra,* this Court closely examined the circumstances surrounding the preparation and transmission of the purported acknowledgment. This Court noted that ". . . an acknowledgment cannot be regarded as an admission of indebtedness where the accompanying circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal limitation." (112 U.S. at 163). As noted above, in the present case, the Court of Appeals did not weigh the circumstances surrounding the preparation and transmittal of the audit confirmation letters. Second, this Court, in *Fort Scott, supra,* held that ". . . to deprive a debtor of the benefit of such a statute [. . . of limitations . . .] by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular claim, and it *must be shown to have been intentional.*" (112 U.S. at 163) (emphasis added). As noted above, the Court of Appeals in the present case expressly found that the acknowledgment, if any, was not intentional. The Court noted that ". . . in the instant case the President was acting routinely in the ordinary course of his business and not for the purpose of binding the corporation to a contract at all . . . no particular special action

was taken in regard to this debt." (634 F.2d at 1317).

A Writ of Certiorari should issue to the Court of Appeals for the Tenth Circuit to resolve this apparent conflict between that Court, other Courts of Appeals and this Court. Failure to resolve this difference in interpretation and application of the law will cause commercially debilitating uncertainty as to the status of the debts of all corporations whose stock is publicly traded. Under the present state of the law, neither corporations whose financial records must be audited, nor independent accounting firms, may accurately predict the potential consequences of the preparation and transmittal of audit confirmation letters. For this reason, the Writ should be granted.

POINT III.

THE DECISION OF THE COURT OF APPEALS WILL SERIOUSLY JEOPARDIZE AND IMPEDE THOSE ACCOUNTING PROCEDURES REQUIRED OF "REPORTING COMPANIES" BY FEDERAL LAW.

By virtue of the decision of the Court of Appeals for the Tenth Circuit in *Buxton v. Diversified Resources, supra,* audit confirmation letters have a legally binding effect and may serve to waive valid corporate defenses. The effect of this development upon contemporary accounting procedures requires little discussion. Obviously, a corporation which authorizes independent accountants to conduct an audit places itself at risk unless it monitors those accounts which are the subject of confirmation letters. Should a corporation follow this course of action,

the "independence" of an audit would be substantially impaired. Similarly, independent accounting firms will place themselves at risk should they prepare and transmit confirmation letters without assuring that the subjects of those letters are not questioned corporate debts. An accounting firm, in light of the Court's decision in *Buxton, supra,* may be liable for failure to ascertain the validity of each debt upon which a confirmation letter is transmitted.

As this Court is aware, pursuant to Sections 13 and 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m and 78o(d), certain corporations are required to file periodic reports with the Securities and Exchange Commission. As required by the regulation set forth at 17 C.F.R. § 249.310, those reports must be in the form specified by Form 10-K, as promulgated by the Securities and Exchange Commission.

Paragraph 1(a) of the Form 10-K Instructions provides "[t]here shall be filed . . . audit balance sheets . . . and audited statements of income and source and application of funds . . ." The Form 10-K Instructions as to financial statements require that balance sheets and other financial statements comply with Regulation S-X which "governs the examination and the form and content of such financial statements."

Regulation S-X, 17 C.F.R. § 210.1-01, *et seq,* (1980), defines "audit" or "examination" as ". . . an examination of the statement by an accountant in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon." Of course, pursuant to subpart (f) of 17 C.F.R. § 210.1-02, certified financial statements must be prepared by an independent

public or certified public accountant. Further, pursuant to 17 C.F.R. § 210.2-02(b), "[t]he accountants report: (1) shall state whether the audit was made in accordance with generally accepted auditing standards . . ." That subsection proceeds to provide that "[n]othing in this rule shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit . . ."

Audits performed in accordance with generally accepted auditing standards must include confirmation of notes payable. The only practical method of confirming the large number of notes payable which may be found in a modern corporation is through the preparation and transmittal of confirmation letters. One of the foremost texts on accounting, *Auditing Principles*, contains the following reference to the confirmation of notes payable as an integral aspect of the auditing process:

> Notes payable should always be confirmed, and a request should be made for a list of any collateral pledged to secure the notes to permit the auditor to verify that assets that are absent because they have been pledged can be fully accounted for. Confirmation is important because external evidence is not available in support of the figures, as it is in the case of accounts payable. Also, because fewer employees are normally involved in the issuance of a note then in the purchase of materials, internal control is of necessity weaker. (Howard F. Stettler, *Auditing Principles* 4th ed. (Prentice-Hall, Inc. 1977, p 358))

Similarly, as set forth in the affidavit of James E.

Lewis, a copy of which appears at page A-22 of the Appendix hereto, the confirmation of accounts payable, especially notes payable, through the use of confirmation letters, is an essential component of contemporary auditing procedures.

Thus, the preparation and transmittal of confirmation letters concerning the accounts payable of a corporation is a necessary component of the financial statements required of all reporting companies by federal law. The combined effect of the reporting requirements imposed by the Securities and Exchange Commission and the decision of the Court of Appeals for the Tenth Circuit in *Buxton, supra,* is that, on the one hand, a corporation must engage independent accountants with knowledge that those accountants will prepare and transmit confirmation letters on all notes payable, while, on the other hand, the very transmittal of those confirmation letters may expose the corporation to substantial liability through waiver of valid defenses to the claims of creditors. Any attempt on the part of the corporation to monitor or control the activities of the independent accountants would destroy the required independence and integrity of the audit.

The decision of the Court of Appeals for the Tenth Circuit seriously jeopardizes both the validity and the integrity of contemporary accounting procedures. In addition, should a corporation attempt to continue to make use of those auditing procedures previously utilized, it will subject itself to substantial potential liability through

waiver of available defenses. For these reasons, this Court should issue a Writ of Certiorari to the Court of Appeals for the Tenth Circuit.

CONCLUSION

There are three distinct and independent reasons the requested Writ of Certiorari should issue:

(a) the Court of Appeals disregarded State law in reaching its decision,

(b) the decision of the Court of Appeals for the Tenth Circuit is in conflict with the position taken by this Court and other Courts of Appeals, and

(c) if allowed to stand, the decision of the Court of Appeals will have a substantial adverse impact upon the debt structure of many reporting corporations and upon contemporary accounting procedures.

Each one of these reasons alone justifies the issuance of the requested Writ, taken together it is clear that review of the decision of the Court of Appeals is necessary to protect the integrity of auditing procedures, to insure compliance with the reporting requirements of the Securities Exchange Act of 1934 and to resolve a conflict in the law which, through resultant confusion and uncertainty, will have a definite adverse impact upon accepted commercial procedures.

For the reasons set forth above, petitioner Diversified Resources Corporation, respectfully prays that a

Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit to review that Court's decision in *Buxton v. Diversified Resources Corporation.*

Respectfully submitted this 13th day of April, 1981.

LeRoy S. Axland
Larry G. Reed
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OF AND FOR
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Attorneys for Petitioner

APPENDIX

John BUXTON et al.,
Plaintiffs-Appellees,

v.

DIVERSIFIED RESOURCES CORPORATION
Defendant-Appellant.
No. 79-1404.
United States Court of Appeals,
Tenth Circuit.
Argued Oct. 15, 1980.
Decided Nov. 25, 1980.

Creditor sued debtor seeking to collect a $20,000 loan. The United States District Court for the District of Utah, Bruce S. Jenkins, J., rendered judgment for the creditor and debtor appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) the president of the corporate debtor had the authority to bind the corporation by signing audit letters acknowledging the debt; (2) the audit letters constituted acknowledgments of the debt so as to toll the statute of limitations under Utah law; and (3) the audit letters estopped the debtor from asserting the statute of limitations.

Affirmed.

1. Corporations 413

Under Utah law, corporate president had authority to sign routine audit statements acknowledging debt in ordinary course of his conduct as president of company.

2. Corporations 300

Under Utah law, corporate president has only powers of director or those powers directly conferred upon him by board of directors.

3. Corporations 397

Under Utah law, rules governing scope of agent's authority apply to officers of corporation just as they do to agents of private individual.

4. Limitation of Actions 145(1)

Audit statement signed by corporate president stating that corporate auditors were making examination of financial statements which indicated a particular debt and requesting that the creditor confirm the accuracy of that information constituted acknowledgments of debt so as to toll statute of limitations under Utah law. U.C.A.1953, 78-12-44.

5. Limitation of Actions 148(1)

Under Utah law, acknowledgment of debt sufficient to toll statute of limitations need not express intention of acknowledging by use of term, but is sufficient if purported acknowledgment is in such terms as to communicate this concept or thought to person receiving it. U.C.A.1953, 78-12-44.

6. Estoppel 13

Under Utah law, where corporation sent audit statements to creditor stating that auditors were making examination of corporate financial statements which indicated the amount due to the creditor and requesting that creditor confirm accuracy of that information, corporation was estopped from asserting statute of limitations as defense to action on debt.

Larry G. Reed and LeRoy S. Axland of Suitter, Axland & Armstrong, Salt Lake City, Utah, for defendant-appellant.

Richard K. Crandall and Adam M. Duncan, Salt Lake City, Utah, for plaintiffs-appellees.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

The question presented in this appeal is whether Diversi-

fied Resources, the appellant, is liable for a debt in the amount of $20,000 for a loan made by the plaintiff-appellee John Buxton, or whether the action by Buxton is barred by the statute of limitations.

The Essential Facts

The predecessor companies to Diversified were U.S. Silver and Mining Corp., U.S. Copper Corp., and Mojave Uranium Corp. Buxton's son, Robert J. Pinder, was president of Diversified and its predecessor companies for more than ten years prior to 1972. Pinder was also Chief Executive officer and managing agent of the companies. According to the testimony of Buxton, the loan was made to the company because of his son's connection with it, and because of an emergency request. Buxton also testified that a note was executed to secure repayment of the loan. However, the note has been lost, if one existed. Buxton was able to produce his cancelled check in the amount of $20,000.

Robert Pinder attested in an affidavit that the loan was made. Ray Jepperson, Controller for Diversified, attested to the fact that the debt in the amount of $20,000 was carried on the books of Diversified from May, 1970 through all of 1972. Jepperson also stated in his affidavit that the loan was not paid during the period mentioned. There was testimony given in a deposition by Rex Frazier, a Certified Public Accountant with Touch, Ross and Co., which company had been engaged to audit the financial statements of U.S. Silver and Mining Co. and Diversified from 1969 through 1976, that the corporation records revealed a $20,000 debt to Buxton from 1971 through 1975.

There was a series of audit letters which were introduced into evidence. These were mailed to Buxton by Diversified

and they referred to a debt owed by Diversified to Buxton amounting to $20,000. Starting in 1971 the letters stated that the auditors were making an examination of the records, and that the records indicated that the company was indebted to Buxton on notes in the aggregate amount of $20,000. The letters sought a confirmation of the accuracy of these statements. The earlier letters were signed by Ray Jepperson, Controller of the Corporation. In the years 1974 and 1975 the company's audit letters stated that the auditors were making an examination of financial statements which indicated the following amount payable to Buxton on notes [$20,000 plus interest]. The letters sought a confirmation of the accuracy of the above information, the same to be communicated to the auditors. The letters were signed by William Wallace, President of Diversified. It is the position of Buxton that the audit letters represented that the corporation acknowledged its debt to Buxton, and that because of his reliance on those representations Buxton withheld attempting to collect the debt.

Diversified's basic assertion is that the applicable Utah statute of limitation bars this action by Buxton. Specifically it is contended that Section 12-44 of the Utah Judicial Code (78-12-44 U.C.A.) is applicable. This section provides:

> *Payment-Acknowledgment-Promise to pay extends* period.-In any case founded on contract, when any part of the principal or interest shall have been paid or *an acknowledgment of an existing liability, debt or claim* or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be *in writing, signed by the party to be charged thereby*.... (Emphasis added).

The district court held that the audit letters were indeed acknowledgments within the meaning of the statute and therefore they serve to toll the running of the Utah statute of limitations. The district court further ruled that com-

munications signed by the corporation estopped it from asserting that the Utah statute of limitations operated as a bar to Buxton's claim. The court also held that there was no genuine issue of material fact and that Buxton was entitled to judgment as a matter of law. Accordingly a summary judgment for Buxton was awarded and entered.

The Contentions

Diversified has appealed the award of summary judgment on four grounds:

1. That neither Jepperson or Wallace had authority to bind the corporation by signing audit letters;
2. That the audit letters do not constitute acknowledgments within the meaning of U.C.A. section 78-12-44 quoted above;
3. That Diversified may not be estopped from asserting the statute of limitations as a defense to this action;
4. That a genuine issue of fact exists as to whether the alleged $20,000 loan by Buxton was repaid by the corporation.

I.

Did the President Have Authority to Sign Audit Letters Acknowledging the Debt?

[1] The first argument presented by Diversified is that there is a material question of fact as to whether the President, Wallace, had authority to bind the corporation to an acknowledgment of the debt to Buxton by merely signing the audit statements. While in some cases there would be a question as to the extent of the President's authority and as to whether that issue would constitute a triable issue of fact, *Knox v. First Security Bank of Utah*, 196 F.2d 112 (10th Cir. 1952), there is no triable question in the case at hand. Here the trial court was not faced with the question of the presence of authority to enter into contracts on behalf of the corporation or to dispose of property of the corporation or to write letters to third persons purporting to bind the corporation. Rather the court was

faced with the simple question of whether the President had the authority to sign routine audit statements on the company in the ordinary course of his business and to acknowledge the information contained in those statements.

[2, 3] It is true that in Utah the President has only the powers of a director or those powers directly conferred upon him by the Board of Directors. *Copper King Mining Co. v. Hanson*, 52 Utah 605, 176 P. 623 (1918); *Passow and Sons v. Wetherbee, et al.*, 50 Utah 243, 167 P. 350 (1917). If we had to be concerned with the question of the President's having power to contract or to dispose of corporate property or bind the corporation by single act, we would perhaps have a question of fact and one of law as well. However, the rules governing the scope of an agent's authority apply to the officers of a corporation just as they do to the agents of a private individual. *See* 19 W. Fletcher, Cyclopedia of the Law of Private Corporations § 437 (perm. ed. Fletcher Cye Corp., Kilcullen rev. 1975); *Carlquist v. Quayle*, 62 Utah 266, 218 P. 729 (1923), reh. den. 1923. Under the fundamental rules of agency expounded in Fletcher and Mecham the authority of an officer of a corporation may be implied from his conduct and from the acquiescence of the directors. Id. at p. 498. Mecham in his Law of Agency states that authority may be implied from the circumstances of the case as long as that authority does not exceed the necessary and legitimate effect of the facts from which it is inferred. 1 Mecham on Agency (2nd Ed.) § 708, p. 497. Such implied authority grows out of the implied acquiescence of the principal to the act of the agent. Id. at p. 498. Mecham also states that every delegation of authority carries with it implied authority to do all those acts which are naturally and ordinarily done in such cases and those acts which are reasonably necessary and proper to carry on the usual and ordinary business of the agent. Id. § 715, p. 502.

In addition, if the parties are found to have acted with reference to the customs of a particular trade or the habits of dealings of a particular party, such customary exercise of a particular act by the agent and acquiescence by the principal

may show that the agent was clothed with actual authority to act. Id. § 717, p. 506. Fletcher further comments that implied authority is "the authority which the principal intended that the agent exercise and includes all those things which are directly connected with and essential to the business at hand." Fletcher, *supra*, § 438, p. 320. *See also* Fletcher, § 449, pp. 348-349 in which he says that:

> A person who knows that the officer or agent of the corporation habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business assumes, as he has the right to assume, that such agent or officer is acting within the scope of his authority. The rule applied is that the authority of an agent to do certain acts in behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have been cognizant of them and would have forbidden them if unauthorized.

Id. § 449, pp. 348-9.

These rules apply fully to the facts at hand. Certainly Wallace had authority to sign the routine audit statements in the ordinary course of his conduct as President of the company and to render the corporation responsible for the audit statements. These were, after all, routine accounting statements, and certainly where he signed them as a matter of course and mailed them to others over a period of at least two years they are to be considered or to be received in evidence. Unquestionably the Board of Directors was familiar with this routine procedure. They certainly were familiar with the fact that these accounting statements were made at regular intervals. If the President did not have any authority to sign routine communications with the creditors, the Board would have surely made it clear that he did not have the authority to do so at the time.

Diversified relies on the decision in *Salt Lake Valley Loan and Trust Co. v. St. Joseph Land Co.*, 73 Utah 256, 273 P. 507 (1928) as the controlling authority in this case. Its holding was that the president of a corporation lacks authority to revive debts barred by the statute of limitations absent an express grant of authority. The controlling facts in *Salt Lake* were that the president of the corporation acted on a single transaction in order to commit the corporation to a particular course of business. The president took a specific action with reference to that matter. The actions of the president in writing letters to defendant acknowledging the debt were held not to be binding on the corporation. But in the instant case the president was acting routinely in the ordinary course of his business, and not for the purpose of binding the corporation to a contract at all. He was seeking to notify the debtor as to what the books showed and to receive some response from him. No particular special action was taken in regard to this debt. Wallace did have the authority to act in furtherance of the ordinary course of his business as President of Diversified. Hence *Salt Lake Valley* does not control the case which is here presented.

[4] We are of the opinion moreover that there is no disputable issue of fact regarding Wallace's authority to sign the audit statements. The question with which we are concerned is whether the audit statements constituted acknowledgment by Wallace, and thereby by Diversified, of the debt to Buxton in order to fall within the statute which would toll the statute of limitations. This is an evidentiary question and not a substantive one or a factual one. We agree with the district court that the audit statements did constitute an acknowledgment very clearly.

Our decision in *Victory Investment Corp., V. Muskogee Electric Traction Co.*, 150 F.2d 889 (10th Cir.), *cert. denied*, 326 U.S. 774, 66 S.Ct. 232, 90 L.Ed. 467 (1945) considered whether, under an Oklahoma statute which extended the statute of limitations similar to the one involved in the case at bar, the financial statements of the defendant constituted

acknowledgment of a debt sufficient to toll the statute of limitations. In that case the question was whether the form of the latest acknowledgment was clear enough. The court said:

> It is not essential that the acknowledgment be expressly stated in such words as 'I acknowledge this as an existing debt,' or 'I am liable on these bonds.' It is enough if language is used from which the acknowledgment may be fairly inferred.

150 F.2d at 891.

The suit in the *Victory* case was on corporate bonds. The defendant had submitted statements to the trustee acting for the bondholders and these contained the general trial balance and the general balance sheet which reflected as a liability an item entitled "Matured Funded Debt Unpaid" and items entitled "Matured Interest Unpaid" and "Matured 2% Tax on Bonds". The court said that the bonds were referred to in one place as a liability and in another place as a current liability. The court held that the statements constituted:

> the equivalent of the defendant submitting to the trustee a written statement signed by it saying 'These bonds are my current liability.' And we think [the statements] constituted a distinct, direct, and unequivocal acknowledgment of a present debt, within the meaning of the statute, and therefore [were] sufficient to interrupt the statute and start it running anew.

150 F.2d at 892.

[5] It is clear from the cases that the acknowledgment need not express the intention of acknowledging by use of the term. It is legally sufficient if the purported acknowledgment is in such terms as to communicate this concept or thought to the person receiving it. The audit statements signed by President Wallace said:

> "Our auditors are making an examination of our financial statements which indicate the following amount payable to you on notes:... Please confirm the accuracy of the above information...."

We are unable to see how the statement could have been more plain. The trial court regarded the statement as being unequivocal in acknowledging a present debt. We agree with the finding. It is in accordance with the holding of this court in *Victory*.

II.

Is Diversified Estopped From Asserting the Statute of Limitations as a Defense to this Action?

[6] We must hold that it is.

The Supreme Court of Utah has set forth the standards which are applicable to estoppel as the doctrine is now being considered. The Utah court said:

> ... The test is whether there is conduct by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

J. P. Koch, Inc. v. J.C. Penney Co., Inc., 534 P.2d 903, 905 (1975).

We have examined the standards which are set forth by the Utah court in *Koch* and are of the opinion that it is a correct statement, and that it applies fully to the case before us.

Diversified argues that there is no showing that it represented to Buxton that the statute of limitations would not be used or that Buxton relied on the letters in failing to bring a suit. But this is not the test. It was not necessary for Diversified to have represented in express terms that it would not invoke the statute of limitations. The question is did Diversified knowingly represent to Buxton that the corporation owed a debt to Buxton. Obviously it did. Moreover, it was entirely logical for Buxton to conclude from the repeated acknowledging of the debt that agreement existed between him and Diversified that the debt was owed and that interest was running. It would quiet any apprehension that he might have had as to whether the debt was alive and well. The

continued acknowledgment by Diversified conveyed to him that there was no need for him to seek to enforce the debt.

Contrary to the contention of Diversified it was not necessary to the creation of an estoppel for the audit letters to set forth a promise to pay. Buxton testified that after receiving the letters for many years he believed that the company was aware of the debt, and intended to pay it when possible, i.e. when it was financially able to pay it. Since there was no dispute between the company and him, he felt it was unnecessary to bring a suit in order to establish that which the company admitted. Now the company takes the position that Buxton allowed the statute of limitations to run. He is justified in responding that he was lulled into a state of inaction. It is entirely logical to hold that Diversified is not to be allowed to now dispute either the existence or validity of the debt.

We have heretofore followed the principle that "estoppel arises where one by his conduct, lulls another into false security and into a position he would not take only because of such conduct." *McWaters and Bartlett v. United States*, 272 F.2d 291 (10th Cir. 1959) as applied to this case: By representing to Buxton that Diversified recognized that $20,000 debt owed to Buxton, Diversified lulled Buxton into a false sense of security. This was wholly inconsistent with the proposition that Diversified disputed the debt. Hence, Buxton saw no need to sue. It follows that the requisites of estoppel were present in this case.

The decision of the Fifth Circuit in the case of *Ingalls v. Ingalls Iron Works Co.*, 258 F.2d 750 (5th Cir. 1958) is cited and relied on by Diversified as applicable to this case. The dispute in the *Ingalls* case concerned whether the account was an open account, or a stated account which was balanced and rendered with an assent. The account was the result of a number of transactions over a period of twenty years. The court held that a reply to an audit statement could not be considered as sufficient to change an open account to an account stated. It is the language in *Ingalls* which is relied on by Diversified. We

can only say that the language used was to the effect that it would be unjust to construe a reply to a single audit inquiry as a commitment to an account stated. The problem must be considered in its factual setting, and ours is wholly different from that which was present in *Ingalls*. It would be improper in our case to not hold under the facts presented that the several letters did constitute an acknowledgment. The opinion of Judge Rives in *Ingalls* took into account the peculiar facts of that case in reaching the conclusion which the court reached. We must, thus, reject the argument of Diversified that it cannot be subject to estoppel particularly on the ground that it would impede accounting practices.

III.

Is There Evidence on the Issue of Repayment of the $20,000 Debt Which Would Justify Submission of This Issue to a Trier of Fact?

We are unable to find any substantial evidence in the record which would support a conclusion that the debt had been paid. It is true that Buxton received stock from U.S. Silver and Mining Co. in 1970. Buxton testified that the transfer of the stock to him occurred in connection with a distinct transaction. This was a ranching transaction between him and Bob Pinder. There was no evidence offered to show that this stock transfer had to do with the debt in question, and hence there would not be any justification for allowing the jury to speculate on this. An opinion was given by William Wallace, President of Diversified. It stated:

> *It is my opinion* that certificate No. 11963 of U.S. Silver and Mining Corp. represents payment in full for any alleged loan made to U.S. Silver and Mining Corp. by John Buxton. (Emphasis added).

An opinion is quite different from a fact. The trial court recognized this in its statement that if Mr. Wallace had "any conviction about (the stock being given as repayment for the debt) he'd state what the fact was. He didn't. He says 'it's my

opinion' ". The court found that the statement was not sufficient to create an issue of fact. We agree.

IV.

Was the Case an Appropriate One for the Grant of a Summary Judgment?

We hold that it was.

Rule 56(c) allows summary judgment where, as here, there is no genuine issue as to any material fact and (the law) entitles the moving party to judgment.

The case presented is one in which the moving party was entitled to judgment as a matter of law. The trial court ruled correctly.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHN BUXTON and MILLARD NELSON,	AMENDED ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND FINDINGS, DETERMINATION, CERTIFICATION AND DIRECTION PURSUANT TO RULE 54(b) F.R.Civ.P.
Plaintiffs,	
vs.	
DIVERSIFIED RESOURCES CORPORATION,	Civil No. C 76-13
Defendant	

The motion of plaintiff Buxton for an order granting partial summary judgment and for entry of express findings and an order making the express determination and certifying that there is no just reason for delay and an express direction for the entry of judgment as provided in and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, came on for hearing before the Court on Friday, the 12th day of January, 1979 at 11:20 o'clock A.M. Adam M. Duncan, Esq., appeared on behalf of the plaintiff Buxton; LeRoy S. Axland, Esq. appeared on behalf of the defendant. The Court had before it (1) the deposition of Rex Frazier taken herein on March 20, 1976 and exhibits thereto; (2) the deposition of E. Ray Jepperson taken herein on May 8, 1976, and exhibits thereto; (3)

the deposition of plaintiff Buxton taken herein on August 31, 1976, and exhibits thereto; (4) the Motion for Partial Summary Judgment of plaintiff Buxton filed herein on April 14, 1976; (5) a transcript of the hearing on the Motion for Partial Summary Judgment of plaintiff Buxton held before Judge Willis W. Ritter on March 10, 1977; (b) "Order Granting Partial Summary Judgment" in favor of plaintiff Buxton signed by Judge Willis W. Ritter on March 11, 1977; (7) the Order dated February 3, 1978 signed by Judge Clarence A. Brimmer of the United States District Court for the District of Wyoming (sitting by designation); and the Court, being fully advised, now makes and enters its:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That this action was commenced in January, 1976.

2. That plaintiff Buxton is an elderly man.

3. That plaintiff Buxton paid $20,000 to the defendant in 1969.

4. That the payment from plaintiff Buxton was a loan, no part of which has been repaid to him.

5. That plaintiff Buxton has not produced a promissory note to evidence said loan and is, therefore, not entitled to the award of attorney's fees.

6. That defendant has had ample and full opportunity, spanning three years, within which to produce any evidence counter to the evidence before the Court, upon which Judge Ritter found, on March 10, 1977, that no genuine issue as to any material fact exists and that plaintiff was entitled to a judgment as a matter of law and defendant has produced no evidence inconsistent with or counter to said findings by Judge Ritter.

7. That the ruling of Judge Ritter that certain written communications signed by defendant stayed, barred or tolled the applicable Utah statute of limitations, and further, that such communications signed by defendant estopped the defendant from asserting the application of the

Utah Statute of Limitations as a bar to the claim of plaintiff Buxton is affirmed by this Court.

8. That the Court finds, at this time, that no genuine issue as to any material fact exists and that plaintiff Buxton is entitled to judgement as a matter of law.

The Court, having made and entered the foregoing Findings of Fact and Conclusions of Law, now makes and enters its

ORDER GRANTING SUMMARY JUDGMENT

IT IS ORDERED

That the Order Granting Partial Summary Judgment made and entered herein on March 11, 1977, be vacated and set aside.

That judgment in favor of plaintiff Buxton and against defendant enter in the principal amount of Twenty Thousand Dollars ($20,000.00), plus interest thereon from and after October 17, 1969 to date, and that plaintiff Buxton be awarded his costs and disbursements herein.

The Court, having made and entered the foregoing Findings of Fact and Conclusions of Law and Order Granting Partial Summary Judgment, now makes and enters its

DETERMINATION, CERTIFICATION AND DIRECTION

1. That this is an action which involves both multiple claims for relief and multiple parties.

2. That this action presents claims which are appropriate for processing and disposition under the provisions of Rule 54(b) F.R.Civ.P.

3. That although properly joined, the claims of plaintiff Buxton are entirely distinct and separate from the claims of plaintiff Nelson herein against defendant.

4. That plaintiff Buxton has sustained his burden of establishing that no good or just reason exists for delaying entry of a final and appealable judgment in favor or plaintiff Buxton and against defendant or for delaying an appeal therefrom.

5. That a partial summary judgment in favor of plaintiff Buxton will finally dispose and finally decide the entire claim of plaintiff Buxton against defendant and all liability of the defendant to plaintiff Buxton.

6. That no just reason exists for delaying entry of a final and appealable judgment in favor of plaintiff Buxton and against defendant or for delaying an appeal therefrom.

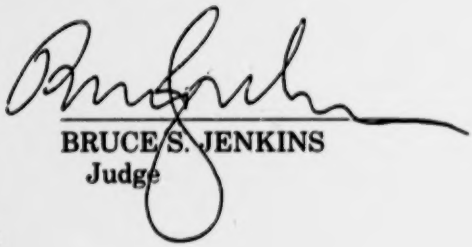
7. That good reason exists for entry of a final judgment in favor of plaintiff Buxton and against defendant.

The Court hereby makes and enters the following:

DIRECTION

The Clerk of the Court is hereby expressly directed to enter a final and appealable judgment in favor of plaintiff Buxton and against the defendant on terms and in an amount consistent with the foregoing.

DATED this eighth day of February, 1979.



BRUCE S. JENKINS
Judge

February 16, 1979
Copies mailed to counsel:
Adam M. Duncan, Esq.
LeRoy S. Axland, Esq.

July 30, 1971

Mr. John Buxton
P.O. Box 1006
Litchfield Park, Arizona

Gentlemen:

Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount of $20,000 as of April 30, 1971, as follows:

Date of Note	Due Date	Rate of Interest	Interest Paid to	Unpaid Balance	Collateral
		-0-		20,000	none

For the purpose of audit only, please confirm the accuracy of the above statement, or report any differences directly to our auditors, Touche Ross & Co., using the space provided below.

Your prompt attention to this request will be appreciated. A stamped, self-addressed envelope is enclosed for your reply.

Yours very truly,
U.S. SILVER & MINING CORPORATION

E. [illegible] PATTERSON,
CONTROLLER

.....

Touche Ross & Co.
600 Continental Bank Building
Salt Lake City, Utah 84101

The above is correct except as noted below:

Exceptions: _____

_____

_____
Company

Date _____ John M. Buxton

Signature and Title

EXHIBIT "A"

June 26, 1972

RE: U.S. Silver & Mining Corp.
U.S. Copper Corp.
Cardinal Silver Inc.
U.S. Livingston Corp.
U.S. Rimrock Exploration Corp.
Consolidated Yellow Jacket Mines, Inc.

John Buxton
Box 1006
Litchfield Park, Arizona

Gentlemen:

Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount of $20,000 as of April 30, 1972, as follows:

Date of Note	Due Date	Rate of Interest	Interest Paid to	Unpaid Balance	Collateral
—	—	-0-	—	$20,000.00	none

For the purpose of audit only, please confirm the accuracy of the above statement, or report any differences directly to our auditors, Touche Ross & Co., using the space provided below.

Your prompt attention to this request will be appreciated. A stamped, self-addressed envelope is enclosed for your reply.

Yours very truly,
U.S. SILVER & MINING CORPORATION

E. R. JEPPERSON,
CONTROLLER

.....

Touche Ross & Co.
600 Continental Bank Building
Salt Lake City, Utah 84101

The above is correct except as noted below:
Exceptions: _____

_____

_____
Company

Date _____

_____
Signature and Title

June 3, 1974

DIVERSIFIED
RESOURCES
CORPORATIO
275 Glenview Building
1701 Lake Avenue
Glenview, Illinois 60025
312/729-5570

John Buxton
Box 1006
Litchfield Park, Arizona

Gentlemen:

Our auditors are making an examination of our financial statements which indicate the following amounts payable to you on notes as follows:

As of	Date of Note	Due Date	Interest Rate	Unpaid Balance Principal	Interest	Collateral
April 30, 1973	—	—	7%	$20,000.00	$5,039.97	none
April 30, 1974	—	—	7%	$20,000.00	$6,439.97	none

Please confirm the accuracy of the above information to our auditors, Touche Ross & Co., 600 Continental Bank Building, Salt Lake City, Utah 84101. Your prompt attention to this request will be appreciated. An envelope is enclosed for your reply.

Diversified Resources
Corporation

William D. Wallace,
President

Confirmation:

The above is correct as of the date indicated except as described below:

_____

_____

_____

By John M. Buxton

Date 6/17/74 Title _____

May 20, 1975

DIVERSIFIED
RESOURCES
CORPORATIO

275 Glenview Building
1701 Lake Avenue
Glenview, Illinois 60025

312/729-5570

John Buxton
Box 1006
Litchfield Park, Arizona

Gentlemen:

Our auditors are making an examination of our financial statements which indicate the following amounts payable to you on notes:

	Date of Note	Due Date	Interest Rate	Unpaid Balance Principal	Interest	Collateral
As of April 30, 1975	—	—	7%	$20,000.00	$7,839.97	none

Please confirm the accuracy of the above information to our auditors, Touche Ross & Co., 600 Continental Bank Building, Salt Lake City, Utah 84101. Your prompt attention to this request will be appreciated. An envelope is enclosed for your reply.

Diversified Resources
Corporation

William D. Wallace,
President

Confirmation:

The above is correct as of the date indicated except as described below:

_____

_____

_____

Date _____ By _____

Title _____

AFFIDAVIT OF JAMES E. LEWIS

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Being first duly sworn, James E. Lewis, on his oath deposes and says:

1. I am a Certified Public Accountant in the State of Utah and a principal in the international accounting firm of Arthur Andersen & Co.

2. I am familiar with the Codification of Statements on Auditing Standards published by the American Institute of Certified Public Accountants (the "Statements on Auditing Standards").

3. Said Statements on Auditing Standards comprise and establish the generally accepted auditing standards of the accounting profession.

4. Said statements on Auditing Standards contain the following Standard of Field Work:

> "Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under examination."

5. The direct confirmation of liabilities, including notes payable, with third parties is an auditing procedure which is performed in response to the foregoing Standard of Field Work.

James E. Lewis
JAMES E. LEWIS

SUBSCRIBED AND SWORN to before me on this sixth day of April, 1981.

Amy N Reed
NOTARY PUBLIC
Residing at Salt Lake County, Utah

My Commission Expires:

6-13-83

Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1855

DIVERSIFIED RESOURCES CORPORATION,

Petitioner,

v.

JOHN BUXTON, et al,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

No. 80-1855

DIVERSIFIED RESOURCES CORPORATION,

Petitioner,

v.

JOHN BUXTON, et al,

Respondents.

QUESTIONS PRESENTED

1. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in holding that a statute of limitations had been tolled by a corporation which had sent to the respondent creditor four separate letters of confirmation signed by the company's controller in two instances and by the company's presi-

dent in two instances and stating that a $20,000 debt was shown on the company books as owing to the respondent?

2. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in concluding that the officers of the corporation which signed these letters of acknowledgement were clothed with apparent authority, that the company's directors did not revoke the statements made by the officers, and that the company was therefore bound by the acts of its agents in acknowledging the debt?

3. Was the District Court of Utah and the Court of Appeals for the Tenth Circuit correct in holding that the conduct of petitioner corporation in continually acknowledging the existence of the $20,000 debt was sufficient conduct to justify the failure

of respondent creditor in filing a lawsuit within the four-year statute of limitations and that the conduct thereby estopped the corporation from claiming the statute of limitations as a defense?

PARTIES

Respondent agrees with the statement contained in the Petition for Writ of Certiorari filed by Diversified Resource Corporation as to the make up of the parties in this litigation.

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OPINIONS BELOW

Respondent concurs that the lower court opinions as printed by the petitioner in its appendix are accurate. All references to the lower court opinions in this Brief shall be to the appendix of petitioner.

JURISDICTION

This lawsuit was commenced in the United States District Court for the District of Utah, Central Division, as a diversity case. Respondent concurs in petitioner's statement as to the events transpiring subsequent to the Tenth Circuit opinion.

STATUTORY PROVISIONS

In addition to Utah Code Ann. Section 78-12-44, cited and reproduced in petitioner's brief, the lower court also considered Utah Code Ann. Section 78-12-25(1), which is the Utah four-

year statute of limitations applicable to this type of action.

STATEMENT OF THE CASE

Respondent agrees with most of the facts stated by the petitioner in its Brief. However, there are certain distortions and omissions which require respondent to briefly state those circumstances and events considered critical to this litigation.

The plaintiff in the lower court action, John Buxton, is the father of Robert J. Pinder who was president of Diversified Resources Corporation and its predecessor companies for more than ten years prior to 1972. Depositions filed in the lower court action revealed that Buxton loaned $20,000 to Diversified Resources Corporation because of his son's connection with the company and because of an emer-

gency request. Buxton testified that a note was executed to secure repayment of the loan but that he was unable to locate the note. He was, however, able to produce his cancelled check in the amount of $20,000. Defendant, during the District Court hearing, conceded that the loan in fact did occur in October of 1969. (District Court hearing, March 10, 1977, p. 3, lines 16-18). In addition, Ray Jepperson, controller for Diversified, attested to the fact that the debt in the amount of $20,000 was carried on the books of Diversified from May 1970 through all of 1972. Jepperson also stated in his affidavit that until 1972 the loan had not been repaid.

A deposition of Rex Frazier, a certified public accountant with Touche, Ross & Company which had audited the

petitioner and its precedessors since 1969, stated that a $20,000 debt was shown in the company records from 1971 through 1975.

On July 30, 1971, a letter was sent to respondent John Buxton by petitioner's predecessor U. S. Silver and Mining Corporation stating: "Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount of $20,000 as of April 30, 1971. . . ." The letter was signed by Ray Jepperson, the controller of the corporation. Respondent Buxton returned the reply portion of the letter to Touche, Ross and acknowledged that the amount noted was correct and executed the appropriate space. (See Appendix p. 18 of the petition).

On June 26, 1972 a similar letter was sent to Mr. Buxton by Mr. Jepper-

son and again Mr. Buxton returned the form to Touche, Ross acknowledging the correctness of the amount. (Appendix, p. 19).

On June 3, 1974, and May 20, 1975, two additional acknowledgement letters were sent to Buxton signed by William D. Wallace, president of Diversified Resources Corporation. These letters for the first time acknowledged a 7 percent interest rate and showed that as of June 1974 there was approximately $6,400 owing and that in the subsequent year of May 1975 there was approximatley $7,800 owing in interest together with the $20,000 principal.

This action was filed in February of 1976. Petitioner Diversified Resources Corporation filed an answer denying liability on the basis that the statute of limitations had expired and that the action could not be main-

tained. Respondent Buxton claimed a six-year statute of limitations applied since the suit concerned a written note while Diversified claimed that the four-year statute of limitations applied as to an oral contract. In any event, the suit was filed after either statute of limitations had run but subsequent to the receipt of the letters acknowledging the debt.

Petitioner states that Buxton filed a Motion for Partial Summary Judgment and that such motion was heard on March 10, 1977, before the Honorable Willis Ritter and that subsequent to the argument the order was entered. (Petition, p. 5). Petitioner's summary omits to state that the Buxton motion was filed on April 14, 1976--eleven months before it was heard and granted. In addition, on July 14, 1976, petitioner demanded ad-

ditional time within which to continue its on-going discovery. This omission is significant because it points up the fact that petitioner had extended periods of time within which to submit any evidence it had which might have established that a "genuine issue as to any material fact" existed.

Petitioner's summary also omits any reference to the fact that petitioner's objections to the partial summary judgment were argued to and rejected by two other judges on two other occasions: Judge Kane of the Unted States District Court for the District of Colorado sitting by special designation heard arguments on April 12, 1978. Judge Brimmer of the United States District Court for the District of Wyoming sitting by special designation heard arguments on February 3, 1979. Thus, although the sparse and

materially incomplete summary in petitioner's statement fails to suggest it, the partial summary judgment granted by Judge Ritter was reviewed by three other federal judges at four hearings.

Accordingly, Judge Bruce Jenkins on February 8, 1979, entered the amended order granting partial summary judgment and findings, determination, certification and direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Appendix pp. 14-17). An appeal was taken to the Tenth Circuit Court of Appeals which, on November 25, 1980, entered its decision affirming the decision of the District Court. (Appendix pp. 1-13).

Petitioner requests that this Court grant certiorari from the District Court decision and the Circuit Court decision both of which found

that the statute of limitations was tolled by the series of confirmation letters sent to respondent.

REASONS FOR DENYING WRIT OF CERTIORARI

POINT I

CERTIORARI SHOULD NOT BE GRANTED UNDER SUPREME COURT RULE 17, AS AMENDED, FOR CONFLICTS BETWEEN A COURT OF APPEALS AND A STATE COURT NOT INVOLVING A FEDERAL QUESTION.

In its Brief, petitioner maintains that the Tenth Circuit Court of Appeals failed to follow the correct interpretation of Utah law as formulated by the Utah Supreme Court regarding acknowledgement of debts sufficient to toll the statute of limitations. Petitioner asserts that the Court of Appeals disregarded Utah law which requires an intentional acknowledgement and requires a showing of authority to make such acknowledgement. (Petition, pp. 7-14).

Rule 17 of the Supreme Court rules was amended on April 14, 1980, and became effective on November 21, 1980. This rule eliminated the language contained in former Rule 19(b) which stated that certiorari could be granted when a federal court of appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law." The adoption of Rule 17 by this Court eliminates the first ground asserted by petitioner for granting certiorari, namely that there exists a conflict between the federal circuit court and the decisions of the Utah Supreme Court. Hence, the discussion concerning the applicable law and cases are irrelevant under the new amended rules.

POINT II

EVEN ASSUMING ARGUENDO THAT A CONFLICT BETWEEN A FEDERAL COURT OF APPEALS AND A STATE COURT IS STILL RELEVANT, THE COURT OF APPEALS DID NOT DEVIATE FROM ESTABLISHED UTAH LAW CONCERNING ACKNOWLEDGEMENT OF A PREVIOUS DEBT.

Even if it were assumed that the 1980 amendment had no effect upon the previous grounds for granting certiorari, a review of the authorities cited together with the undisputed facts in this case shows that the circuit court did not deviate from established Utah law.

The Salt Lake Transfer Co. v. Shurtliff 30 P.2d 733 (Utah 1934) cited by petitioner [Petition p. 8] is in complete accord with the findings of the District Court and the Court of Appeals. In that case the Utah Supreme Court reviewed the history of the Utah statute allowing an

acknowledgement to toll a statute of limitations. The Utah court discussed various Kansas decisions relating to the Kansas statute from which the Utah statute was patterned. The Utah court noted that the Kansas court required an intentional showing of the acknowledgement. However, this "intention" could be derived from the document itself.

This Court in City of Ft. Scott v. Hickman, 112 U.S. 150, interpreting the Kansas statute and citing a previous decision, stated:

> An acknowledgement of an existing liability, debt or claim within the meaning of the Kansas statute, implies a meeting of minds, the right of the creditor to take what is written as an acknowledgement to him of the existence of the debt, as well as the intention of the debtor, as deduced from the contents of the writing and all the facts accompanying it, to make such acknowledgement.

112 U.S. at 163.

The Utah Supreme Court in Salt Lake Transfer Co., supra at 737, quoted with approval the preceding language from City of Ft. Scott, supra, and concluded that the letter in that case was not sufficient to toll the statute since there was nothing in it that admitted a present debt for which the writer was liable.

The Utah court has also noted that questions involving the tolling of a statute of limitations are questions of law for the court to decide. Beck v. Dutchman Coalition Mines Co., 269 P.2d 867 (Utah 1954). This is done by examining the actual documents which are claimed to have tolled the statute.

In Beck, supra, for example, the Utah Supreme Court found that the phrase contained in a letter "we feel that the enclosed check for $1,000

is a very liberal one to compensate the payment for your services to this date" was a sufficient acknowledgement of an existing debt to toll the statute of limitations as to an attorney's fee. On the other hand, as previously pointed out, the Utah Supreme Court felt the language contained in a letter in Salt Lake Transfer Co., supra, was insufficient to toll the statute.

Other decisions cited by petitioner support the position that the Utah court will examine the document itself to determine the intent of the writer. In Weir v. Bauer, 286 P. 936 (Utah 1930), the Utah court concluded that an annual report and an annual tax report were not sufficient to toll the statute of limitations when they were not signed on behalf of the corporation and were not delivered or

intended to be delivered to the plaintiff. However, the court concluded that a contract executed on behalf of a corporation and given to the plaintiff stands on a different footing. The court noted:

> The acknowledgement so made specifically referred to the debt or obligation in question and to the amount thereof. It was not an acknowledgement to a mere stranger. All parties concerned were parties to the agreement which was subscribed by all of them, and bonds by each regarded and acknowledged as an existing liability of the corporation.

Id. at 286.

Finally, in O'Donnell v. Parker, 100 P. 1192 (Utah 1916), the court concluded that the listing in a bankruptcy schedule of a debt which had lapsed was not sufficient to toll the statute since the listing was not intended to be communicated to the creditor, but was done merely because it was required to accomplish bankruptcy.

The court noted:

> To say that there is no difference between writing a personal letter by a debtor to his creditor in which the former acknowledges the existence of the claim and in filing a schedule of his debts under the rules governing bankruptcy proceedings is to lose sight of substance and be governed entirely by forms.

Id. at 1195.

Thus, Utah law is clear that the question of "intent" can be ascertained by the court as a matter of law from the document itself and from the purpose of such document. In the case at bar respondent John Buxton received four separate letters personally addressed to him and signed by either the controller or the president of the petitioner or its successor, which letters stated: "Our auditors are making an examination of our records which indicate we were indebted to you on notes in the aggregate amount

of $20,000 as of. . . ." It is hard to believe that a more direct and straightforward statement acknowledging a debt could be made. In addition, the letters were sent to Buxton and not to third parties or filed in any type of court proceeding.

As a matter of law, therefore, the court properly concluded that the document written by the petitioner constituted an intentional acknowledgement of the existing debt sufficient to toll the statute. To hold otherwise would completely ignore the language of the letters, which cannot be done in the absence of allegations of fraud, mistake, or misrepresentation. The record is void of any claims made by petitioner of any such defenses even though there was obviously ample opportunity to develop facts upon which such defenses could be based.

Petitioner next contends that the Tenth Circuit Court of Appeals failed to follow Utah law in requiring that a corporate officer must be authorized to make an acknowledgement if it is to be sufficient to toll the statute of limitations. (Petition, p. 11-14). Petitioner claims that the Tenth Circuit Court of Appeals failed to recognize Utah law as expounded in Salt Lake Valley Loan and Trust Co. v. St. Joseph Land Co., 237 p. 507 (Utah 1928).

This argument is also without merit. In St. Joseph Land Co., supra, the general manager and a stock holder of a land and water company wrote several letters to a creditor during a four-year period and made various statements concerning notes which were previously owing. The creditor contended that these letters tolled the

statute of limitations. The Utah court disagreed and found that neither the manager nor the stockholder had express or implied authority by the company to write these letters. In so holding the court noted:

> Joseph testified that he had never been authorized by resolution or otherwise by the board of directors of either of the defendant corporations to write any of the letters above set out; that the letters were written by him in his individual capacity and not as general manager of either of the defendant corporations. There is no evidence that the board of directors of either of the defendant corporations directed or authorized the writing of the letters so written by Joseph.

Id. at 510.

Likewise, a stockholder and former secretary of the corporation were held not to have acted for the corporation:

> It is clear that the evidence in these cases does not justify a finding that the letter written by Julian M. Bamberger is binding upon the defendant corporations. There is no evidence

> showing or intending to show that Bamberger ever represented the defendant corporation or either of them in any business transaction whatsoever or that he had either expressed or implied authority to so act for the defendant corporation.

Id. at 510.

In the instant case, however, there has been no evidence introduced during the years of discovery showing that Wallace or Jepperson were not authorized by the corporation to send out the acknowledgement letters. These communications were not, as in St. Joseph Land Co., supra, letters written on a one-time basis not within the normal course of business. Rather, these letters were sent to the various creditors as part of the routine auditing program of the corporation and were performed as a function of the corporation and its officers. As noted by the Tenth Circuit Court of

Appeals:

> These were, after all, routine accounting statements, and certainly where he signed them as a matter of course and mailed them to others over a period of at least two years they are to be considered or to be received in evidence. Unquestionably the board of directors was familiar with this routine procedure. They certainly were familiar with the fact that these accounting statements were made at regular intervals. If the President did not have any authority to sign routine communications with the creditors, the Board would have surely made it clear that he did not have the authority to do so at the time.

634 F.2d at 1316.

Again, it should be noted that the record is void of any evidence whatsoever taken in the discovery portion of this litigation showing that Wallace or Jepperson did not have authority to execute and sign the acknowledgement letters. Whether the officers also had authority to toll the statute of limitations is irrelevant if they

are placed in a position of apparent authority by the corporation which misleads third parties into believing that such authority in fact exists. Here, the letters written to the respondent specifically acknowledge the existence of the debt for four separate years and were signed by officers of the corporations. As such, it was not Buxton's obligation to make any further inquiry into whether such communications were authorized by the board of directors, particularly since the Board had obviously acquiesced in sending such statements over this long period of time.

Thus, the United States District Court for the District of Utah and the Tenth Circuit Court of Appeals did not ignore Utah law requiring a showing of agency and authority, but merely determined that the facts and

circumstances as shown by the documents themselves and the absence of any contradictory evidence indicated either express, implied, or apparent authority sufficient to bind the corporation.

Finally, it should be observed that both lower courts found an alternate ground for not applying the statute of limitations which is separate and distinct from the statutory tolling provision of Utah Code Ann. Section 78-12-44. Both courts specifically found that the conduct of the petitioner estopped it from claiming any reliance upon the statute of limitations since the petitioner's conduct had misled and caused the respondent Buxton to delay filing his lawsuit because of the representations made by the corporation. As stated by the Tenth Circuit Court of Appeals:

By representing to Buxton that

> Diversified recognized that $20,000 debt owed to Buxton, Diversified lulled Buxton into a false sense of security. This was wholly inconsistent with the proposition that Diversified disputed the debt. Hence, Buxton saw no need to sue. It follows that the requisites of estoppel were present in this case.

634 F.2d at 1318.

The Utah Supreme Court, in Weir, supra, cited by petitioner, specifically recognized that the doctrine of estoppel can prevent the statute of limitations from taking effect. In that case the Utah Supreme Court stated:

> We think the defendants were estopped from asserting the bar of the statute. It is clearly shown that at all times the corporation and all parties concerned treated and regard the bonds as an existing liability against the corporation. They were so regarded and treated on the corporation's books and records, and all parties concerned were willing that the maturity or time of payment of the bonds be extended and kept alive. . . . Relying upon such promises and assurances the plaintiff was lulled into security that the statute of limitations would not be relied on because

> of delay of such formal action. Such promises and assurances were made by one, who, as is seen, had the power to direct the corporation in such particular. . . .
>
> * * *
>
> [B]ecause of the stated conditions and circumstances, we are of the opinion that it would be inequitable and in effect a fraud upon the plaintiff to permit the bar of the statute to be imposed, and we thus hold the defendants estopped from interposing it.

286 P. at 946.

In summary, therefore, the rules of this Court do not permit certiorari to be granted for an alleged conflict between a federal court and a state court involving state law. Even if an exception were made, however, it is clear that the Tenth Circuit Court of Appeals followed the appropriate Utah law concerning the interpretation of the tolling statute and found from the circumstances of the case that the letters sent to respondent were

both intentional and authorized. Finally, the estoppel grounds found by both courts is sufficient to sustain the decision regardless of any other claimed errors. For these reasons petitioner's Point I does not justify the granting of certiorari.

POINT III

THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT OPINIONS OR THE OPINION OF THIS COURT.

Petitioner asserts that certiorari should be granted because the Tenth Circuit Court of Appeals is in conflict with the Ninth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals and is also in conflict with this Court based upon the Ft. Scott v. Hickman opinion. Such argument is without merit.

First, it should be observed that

each of the decisions cited by the petitioner involved an interpretation of various state or federal statutes not involving the Utah statute now in question. While these statutes from other states are similar in their wording it is obvious that the federal court of each jurisdiction must apply the interpretation given to the state statute by the highest state court, and a conflict of federal jurisdictions concerning state laws is therefore ordinary and common place.

Second, upon analysis, the supposed conflicts in the circuits does not exist. In Moore v. Snider 109 F.2d 840 (D.C. Cir. 1940) [Petition, p. 15-16], the Court of Appeals for the District of Columbia decided a case quite different from the instant case. In Moore a store had sent a letter to a customer requesting that the cus-

tomer confirm the amount of debt owing to the store. The customer returned the letter and the store claimed an acknowledgement of the existing debt. The customer claimed, however, that she only signed the agreement because the store falsely stated to her that the only purpose of the statement was to verify the account and had no legal significance whatsoever.

The Court of Appeals for the District of Columbia held that, based upon this claim of misrepresentation in the inducement of the acknowledgement, evidence should be taken before the document itself could be found to be conclusive. Of course, this is completely different from the instant case in which the petitioner was the debtor and sent the acknowledgement of the debt to the respondent creditor. There is no claim in this

case as to any misrepresentation or fraud inducing petitioner to send the acknowledgement letters. Regardless of what the true motivations of petitioner were, the fact remains that the letters themselves were received by respondent, and he was entitled to rely upon their language.

In addition, the Circuit Court for the District of Columbia in the subsequent case of Irvine v. Gradovile, 221 F.2d 544 (D.C. Cir. 1955), held that Moore, supra, is inapplicable when no circumstances negating the language of the letter are plead and where the language of the letter manifests a clear intent to pay the debt. The court also observed that upon remand the lower court Moore, supra, found that the woman customer had indeed intended the acknowledgement to be legally binding, and, therefore,

judgment was entered in favor of the store on the original debt.

In Mann v. Pacific Land and Cattle Co., 107 F.2d 862 (9th Cir. 1939); [Petition, pp. 16-17] the Ninth Circuit found that an auditor who sent out a specific letter to a creditor did not have authority to waive the statute of limitations since such authority could only come from the president who specifically denied approving such letter. Again, the facts in that case are distinguishable from the instant case since the letter sent by the auditor was not a routine type of communication, was not signed by the president, and was not approved either directly or indirectly by the board of directors. Here, however, four separate communications were sent to plaintiff, two of which were signed by the president who had express, implied, or apparent

authority to make such statements, and all of the letters were expressly or impliedly approved by the board of directors.

Ingalls v. Ingalls Iron Works Co., 258 F.2d 750 (5th Cir. 1958) [Petition, pp. 17-18] does not concern the question of tolling a statute of limitations as conceded by the petitioner. However, in addition to this infirmity, the question there involved a reverse situation in which the creditor had sent a request for "verification" to the debtor who, upon signing the document, was claimed to have created an "account stated" rather than an open account. The court, in rejecting this argument, held that the accounting firm which sent out the request "had no authority to contract for the Company or to agree to any statement of the account with Mrs.

Ingalls." Id. at 753. This case is therefore distinguishable not only because of its subject matter, but also because of a lack of authority on the part of those sending the communication.

Likewise, petitioner's claim that the opinion of the Tenth Circuit Court of Appeals is in conflict with the opinion of this Court in City of Ft. Scott v. Samuel G. Hickman, 112 U.S. 150 (1884) is equally without merit. In that case the question was whether a committee of a city council which had made a report containing a statement of the assets and liabilities of the city in a circular which was prepared in conjunction with the report could be held to have acknowledged a debt as to certain bonds when neither the report nor the circular was sent to the plaintiff bond holder.

This Court stated:

> It is plain that the city made no acknowledgement to the plaintiff. It held no communication with him. It sent no copy of the circular letter to him. It intentionally refrained from doing so. It had a cogent reason for refraining, in the decision which had been so made in its favor. He received no circular letter from the city.
>
> * * *
>
> . . . the record, taken as a whole, did not amount to an acknowledgement to the plaintiff, as a holder of the Macadan bonds. It is not found that the plaintiff even knew of the record until after he brought this suit.

Id. at 163.

Thus, this Court held that in a case where the creditor was not notified of the claimed acknowledgement, where the acknowledgement specifically stated in its terms that it was in the terms of a compromise settlement, and where the documents themselves were never intended to be received by the creditor, such circumstances

negated any inference that an acknowledgement had been made.

In the instant case, however, the four acknowledgement letters were sent directly to the plaintiff, contained an unequivocal statement as to the amount owing, and even contained a form that the plaintiff could use to respond in agreeing to the acknowledged amount. Again, it should be noted that this Court was interpreting the Kansas statute while the Tenth Circuit Court of Appeals was interpreting the Utah statute. Thus, not only were the facts significantly dissimilar, but the statutory basis was also different, even though both statutes contain similar language. Decisions based upon variations in factual situations or in statutory language do not amount to a conflict justifying certiorari. See Harlan, Manning

the Dikes 13 Record NYCBA 541, 552 (1958); Stern, Denial of Certiorari Despite a Conflict 66 Harv. L. Rev. 465, 470 (1953).

For the foregoing reasons, petitioner's claims of conflict among the United States Circuit Court and with this Court are baseless and certiorari is not justified.

POINT IV

THE DECISION OF THE COURT OF APPEALS DOES NOT SERIOUSLY JEOPARDIZE OR IMPEDE ACCOUNTING PROCEDURES REQUIRED OF "REPORTING COMPANIES" BY FEDERAL LAW.

As the final basis for arguing certiorari petitioner claims that the decision of the Tenth Circuit Court of Appeals will seriously "jeopardize both the validity and integrity of contemporary accounting procedures." (Petition, pp. 20-24). It is difficult to ascertain what provision of

Rule 17 of the Supreme Court Rules petitioner is attempting to come under by the arguments advanced under Point III of its petition.

However, the effects which the petitioner claims will occur because of the Tenth Circuit opinion are speculative and unsupported by any fact. First, the Tenth Circuit opinion concerns only Utah law and the specific provision which allows tolling of a statute of limitations when an acknowledgement has been made. This decision would not be binding upon any other circuit court or upon any other states which do not have an identical law.

Second, the claimed conflict between independent audits and the acknowledgement of debts of the corporation can easily be eliminated by a simple disclaimer contained in the

confirmation letters stating that the letter does not admit to the existence of any debt for purposes of liability or for the tolling of any applicable statute of limitations, but only reflects a book entry by the corporation. In such an instance the creditor would clearly be put on notice that the receipt of such a letter was not tolling the statute of limitations, and he would be required to institute a lawsuit or lose his claim.

Finally, as has been observed from cases cited herein, statements signed by independent auditors are not deemed to be an acknowledgement of the corporation itself since such auditors do not have the same powers as corporate officers. An additional safeguard would be merely to have the independent accountants sign, send, and receive the confirmation letters

so that no agency can be imputed to the corporation.

Thus, the opinion of the Tenth Circuit Court of Appeals should be restricted to the facts of this particular case in which the Utah statute is being applied, and in which no disclaimer was contained in any of the letters, and the letters were signed by corporate officers of the debtor. As such, this decision has no impact whatsoever upon other corporations or accounting firms.

CONCLUSION

The three purported grounds for justifying certiorari raised by petitioner are without merit. The Supreme Court rules do not now permit certiorari to be granted because of a conflict between a federal circuit court and a state court when a federal question is not involved. In addition, the

record is clear that the Tenth Circuit Court of Appeals followed Utah law in holding that the petitioner had acknowledged the existing debt and that the acknowledgement was both intentional and authorized.

The alleged conflict among the circuits and between the Tenth Circuit and this Court is also baseless. Not only do the other decisions rendered by the various courts involve statutes other than Utah's statute, but those decisions also involved dissimilar fact situations which are easily distinguishable from the instant case.

Finally, the purported catastropic effect such a decision will have upon the reporting procedures of corporations under federal law is also an argument without substance. This decision is limited to the facts of this case, and concerns only Utah law. Accoun-

tants and corporations concerned about this decision can easily disclaim the running of a statute of limitations in the acknowledgement letter and can have the certified accountants sign the letter so that no agency question exists.

For the reasons set forth above, respondent respectfully prays that a Writ of Certiorari should not issue to the United States Court of Appeals for the Tenth Circuit to review that court's decision.

Respectfully submitted this 26th day of June, 1981.

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